92-432

No. _____

Supreme Court, U.S.
FILED
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DICK GIFFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 28 U.S.C. § 2680(c), which exempts from coverage of the Federal Tort Claims Act "[a]ny claim arising in respect of the . . . detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer," preclude a claim against the United States for injury to private property during temporary detentions of the property by officers of the Bureau of Land Management?

2. Did the district court err in dismissing this action on the ground that it lacked subject matter jurisdiction?

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OPINIONS BELOW

1. Memorandum (not for publication) of the United States Court of Appeals for the Ninth Circuit dated June 9, 1992 (A.1-2).

2. Memorandum and Order of the United States District Court for the District of Montana, Billings Division, dated February 14, 1991 (A.3-9).

3. Administrative Determination by the Office of the Solicitor, United States Department of the Interior, dated April 17, 1989 (A.10-13).

4. Reconsideration of Administrative Determination by the Office of the Solicitor, United States Department of the Interior, dated November 17, 1989 (A.14-16).

5. Judgment entered by the United States Court of Appeals for the Ninth Circuit on June 9, 1992 (A.17).

6. Judgment entered by the United States District Court for the District of Montana, Billings Division, on February 1, 1991 (A.18).

JURISDICTION

The judgment of the district court (A.18), as well as the Memorandum and Order on which it is based (A.3-9), were entered on February 14, 1991, and Notice of Appeal was timely filed on March 15, 1991.

The judgment of the Court of Appeals for the Ninth Circuit (A.17), and the Memorandum on which it is based (A.1-2), were entered on June 9, 1992. No petition for rehearing was filed.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, provides in pertinent part as follows at § 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Jurisdiction of the district courts over property damage claims is provided for at 28 U.S.C. § 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Among the 13 exceptions to the FTCA is the one at issue here, 28 U.S.C. § 2680(c), where it is provided that § 1346(b) shall not apply to:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

STATEMENT OF THE CASE

Because this action was dismissed for lack of subject matter jurisdiction, the material allegations of Petitioner's complaint (A.19-28) are for present purposes taken as admitted and construed favorably to the Petitioner. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Square D Co. v. Niagara Frontier Tariff Bureau,* 476 U.S. 409, 411 (1986). The following is a summary of those allegations.

During 1984 and 1985, Petitioner participated in the so-called Adopt-A-Horse Program administered by the Department of the Interior, Bureau of Land Management (BLM) pursuant to the Wild and Free Roaming Horses and Burros Act, 16 U.S.C. § 1331, *et seq.,* and thereby obtained possession of several horses. Subsequently, between November of 1985 and April of 1986, title was transferred from the BLM to Petitioner, so that by May of 1986 Petitioner owned outright all of the horses he obtained through the Adopt-A-Horse Program.

In late June of 1986, Petitioner supplied some 25 horses for use in a rodeo held at Gardiner, Montana, some of which he had acquired through the Adopt-A-Horse Program. On June 30, 1986, following the rodeo, Petitioner loaded his horses onto a trailer and was preparing to return them to his home in Wyoming. At that point, a BLM law-enforcement officer ordered the detention of all of those horses.

Thereafter, BLM employees inspected Petitioner's horses at some point between June 30, 1986, and July 3, 1986. The BLM employees so carelessly and negligently handled and herded the horses that four of them sustained injuries. The injuries to one of those horses were permanent.

A second detention incident occurred about seven weeks later. Petitioner also owned approximately 16 other horses which were being kept on lands in southern Montana. Some of those horses had also been acquired through the BLM's Adopt-A-Horse Program. On August 20 and 21, 1986, BLM employees rounded those horses up by chasing them with a helicopter, roping them, roughly loading them onto trailers, and transporting them to a BLM facility where they were detained for inspection by BLM employees. In the course of rounding up these horses, BLM employees so carelessly and negligently herded and handled them that one horse was so seriously injured that it later died, two sustained permanent crippling injuries, and one was left with a permanent limp.

It is undisputed that both of these detentions were undertaken as part of an investigation conducted by federal law-enforcement officers acting within the scope of their employment.

Petitioner unsuccessfully pursued his administrative remedies (A.10-16). Petitioner's complaint (A.19-28), filed in the district court on May 16, 1990, alleged jurisdiction under 28 U.S.C. § 1346(b) and sought to recover money damages for injuries to

his horses alleged to have been proximately caused by the negligent conduct of BLM employees.

On February 14, 1991, the district court entered its Memorandum and Order (A.3-9) and Judgment (A.18), ruling that 28 U.S.C. § 2680(c) covered the BLM law-enforcement officers involved in the subject detentions, thereby precluding subject matter jurisdiction, and therefore granted the Government's motion to dismiss. (A.9).

A timely appeal followed, and on June 9, 1992, the Court of Appeals for the Ninth Circuit affirmed (A.1-2) and entered judgment accordingly (A.17).

ARGUMENT

A. This case squarely presents the question of federal law expressly left open by this Court in the *Kosak* decision.

In the course of carrying out its many functions through its multitude of departments, bureaus, and agencies, the Government employs law-enforcement officers of varying description to enforce the law in a wide variety of contexts, which often entails the detention of private property.

Thousands of such detentions are conducted every year by customs and excise officials in the course of carrying out their unique functions. As is apparent from the decisions discussed below, however, many

other detentions are conducted by law-enforcement officers acting entirely without the context of the Government's customs and excise activities.

Here, the facts are clear, simple, and deemed to be admitted for present purposes. Several of Petitioner's horses were injured, crippled, or killed due to the negligent conduct of employees of the BLM acting within the scope of their employment in the course of detentions in southern Montana related to an investigation into possible violations of federal law pertaining to wild horses. It is difficult to imagine circumstances further removed from the context of the Government's customs and excise activities.

As such, it is submitted that the instant case presents a perfect opportunity for this Court to answer the question expressly left open in *Kosak v. United States,* 465 U.S. 848 (1984). There, this Court considered a different aspect of 28 U.S.C. § 2680(c). Specifically, *Kosak* focused on the phrase "[a]ny claim *arising in respect of* . . . the detention of any goods or merchandise by any officer of customs. . ." (emphasis supplied). *Kosak* resolved a conflict among the circuits by making it clear that § 2680(c) precludes FTCA claims against the United States not only for damage caused by the fact of detention by customs officials, but also for damage caused by the negligent handling of detained property by customs officials during detention.

Here, the focus is on that portion of § 2680(c) which refers to "the detention of any goods or merchandise by any officer of customs or excise *or any*

other law-enforcement officer" (emphasis supplied). In *Kosak*, this Court took care to make clear that it was leaving open the question of whether law-enforcement officers acting outside the customs context are covered by 28 U.S.C. § 2680(c), stating:

> We have no occasion in this case to decide what kinds of "law-enforcement officer[s]," other than customs officials, are covered by the exception.

Kosak, 465 U.S. at 852, n. 6.

For the reasons set out below, this Court is respectfully urged to use the opportunity presented by this case to settle the troublesome question of whether the scope of 28 U.S.C. § 2680(c) is so broad as to cover law-enforcement officers acting well outside the context of the Government's customs and excise activities.

B. The provisions of § 2680(c) are ambiguous, and the law is unclear as to whether the exception is sufficiently broad to cover law-enforcement officers acting well outside the scope of the Government's customs and excise activities.

Since the enactment of the FTCA nearly 50 years ago, the courts of appeal have in a number of cases had occasion to consider the scope of 28 U.S.C. § 2680(c) in actions involving the detention of and injury to private property by federal law-enforcement officers other than customs and excise officers. It is

apparent, however, particularly since the implicit recognition in *Kosak* of an ambiguity in § 2680(c) as to its scope, that considerable uncertainty remains as to the reach of the exception in such cases.

On the one hand, some of the courts of appeal have explicitly recognized the ambiguity created by the language of § 2680(c), as well as the consequent competing interpretations as to its reach. In a post-*Kosak* opinion, the Court of Appeals for the Second Circuit succinctly summarized the contrasting interpretations created by the ambiguity, and suggested that, in a proper case, a narrow construction limiting the scope of § 2680(c) to the customs and excise context might very well be warranted. In *Formula One Motors, Ltd. v. United States,* 777 F.2d 822, 823 (2nd Cir. 1985), the court made the following observations:

> The Government contends that the claim for damage to appellant's automobile is a claim "arising in respect of . . . the detention of any goods . . . by . . . any other law-enforcement officer." In the Government's view, section 2680(c) applies to damage incurred in the course of any search and seizure undertaken by any law enforcement officer. The terms of the statute, construed in light of the doctrine of *ejusdem generis,* might suggest a more narrow reading. First, it can be argued that the "detention" to which section 2680(c) applies is not every physical seizure preliminary to a search

but only a possession effected in the course of assessing or collecting any tax or customs duty. Second, it might also be thought that the specification of "any officer of customs or excise" followed by "any other law-enforcement officer" implies that other law enforcement officers are covered only when their actions are in aid of customs or excise functions of the Government. Nevertheless, several circuits have ruled, with scant discussion, that section 2680(c) applies to detentions beyond the context of customs duties and taxes, *e.g., United States v. 2,116 Boxes of Boned Beef,* 726 F.2d 1481, 1490-91 (10th Cir.) (Department of Agriculture), *cert. denied sub nom. Jarboe-Lackey Feedlots, Inc. v. United States,* ___ U.S. ___, 105 S.Ct. 105, 83 L.Ed.2d 49 (1984); *United States v. Lockheed L-188 Aircraft,* 656 F.2d 390, 397 (9th Cir. 1979) (Federal Aviation Administration); *United States v. 1500 Cases, More or Less,* 249 F.2d 382, 384 (7th Cir. 1957) (Food and Drug Administration), though the contrary view has been expressed, *see A-Mark, Inc. v. United States Secret Service,* 593 F.2d 849, 850 (9th Cir. 1978) (Tang, J., concurring). The Supreme Court has noted the ambiguity as to the reach of the phrase "any other law-enforcement officer," but has not determined whether the section

2680(c) exemption is limited to the customs or excise context. *See Kosak v. United States,* 465 U.S. 848, 852 n. 6, 104 S.Ct. 1519, 1522-23 n. 6, 79 L.Ed.2d 860 (1984).

The *Formula One* court found it unnecessary to resolve the issue because it was satisfied that the law-enforcement activity in that case, which involved the detention of an automobile in transit from abroad and still in its shipping container by DEA agents searching for smuggled narcotics, was "sufficiently akin to the functions carried out by Customs officials to place the agents' conduct within the scope of section 2680(c)." *Formula One,* 777 F.2d at 825.

More recently, the Court of Appeals for the Seventh Circuit specifically noted that *Kosak* left open the question as to the scope of § 2680(c), and expressly recognized the existence of the competing "literal" and "functional" interpretations of the exception. *Paul v. United States,* 929 F.2d 1202 (7th Cir. 1991). However, the court found it unnecessary to resolve the question in that case, and decided to "leave the resolution of the problem for another day." *Id.,* at 1204.

Additionally, in concurring opinions, two circuit judges have cogently advocated a narrow construction of § 2680(c) which would require some nexus between the conduct in question and the Government's customs and excise activities. *Formula One*, 777 F.2d at 825 (Oakes, J., concurring); *A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849, 850-851 (9th Cir. 1978)

(Tang, J., concurring). Judge Oakes and Judge Tang agreed that the phrase "or any other law-enforcement officer" at the end of § 2680(c) "should be viewed as Congress' recognition of the fact that federal officers, other than customs and excise officers, sometimes become involved in the activity of detaining goods for tax or customs purposes," and shared the view that the decisions which apply the exception to law-enforcement officers acting outside the context of customs and excise activity are "wrongly decided." *A-Mark,* 593 F.2d at 851; *Formula One,* 777 F.2d at 825.

On the other hand, some of the courts of appeal have, as in the instant case, literally and broadly construed the phrase "or any other law-enforcement officer" to effectively mean *any and all* law-enforcement officers regardless of the character or context of the government activity in question. Among the pre-*Kosak* cases broadly applying the exception are the often-cited decisions in *United States v. Lockheed L-188 Aircraft,* 656 F.2d 390 (9th Cir. 1979); *United States v. 1500 Cases, More or Less,* 259 F.2d 382 (7th Cir. 1957); *United States v. 2,116 Boxes of Boned Beef,* 726 F.2d 1481 (10th Cir. 1984), *cert. denied sub nom. Jarboe-Lackey Feedlots, Inc. v. United States,* 469 U.S. 825 (1984).

It seems worthy of comment that the Court of Appeals for the Seventh Circuit, which rendered the 1957 decision in *1500 Cases*--a case frequently cited in post-*Kosak* decisions as precedent for an expansive reading of § 2680(c)--may be prepared to reconsider its

earlier broad reading of the exception in light of *Kosak*, as indicated by its above-referenced observations in *Paul v. United States,* 929 F.2d at 1204.

Post-*Kosak* decisions by the courts of appeal broadly applying the exception include *Ysasi v. Rivkind,* 856 F.2d 1520 (Fed. Cir. 1988). As was the case in *Formula One*, the decision in *Ysasi* was grounded on the court's view that, for all intents and purposes, the case *was* a "customs" case and therefore came within the ambit of the exception. The *Ysasi* court concluded:

> Furthermore, 8 U.S.C. § 1232(b)(3) [Immigration and Nationality Act] directs that all provisions of law relating to seizures for violation of the customs laws shall apply to seizures under section 1324(b)(1), indicating the similarity of the violations of law here to violations of the customs laws. We, therefore, agree with the district court that seizures pursuant to section 1324(b)(1) are "sufficiently akin to the functions carried out by Customs officials to place the agents' conduct within the scope of section 2680(c)."

Ysasi v. Rivkind, 856 F.2d at 1525.

While specifically noting that this Court had expressly declined to decide the issue in *Kosak,* the *Ysasi* court went on to indicate that it found the decisions refusing to limit the scope of the exception to be persuasive. *Ysasi*, at 1525.

More recently, the Court of Appeals for the Eleventh Circuit also adopted a broad construction of the exception in *Schlaebitz v. U.S. Dept. of Justice,* 924 F.2d 193 (11th Cir. 1991) *reh. denied* 933 F.2d 1023 (1991). In so doing, however, the court observed that the question was not addressed in *Kosak*, and recognized the plausibility of a narrow interpretation:

> The specific exception addressed in section 2680(c) discusses the "collection of any tax or customs duty" and the detention by any tax or customs official. Thus, we could construe the phrase "or any other law enforcement officer" as supplementing the tax and customs context of the exception, thus including only other officials assisting the customs or tax collection. *See A-Mark-Inc. v. United States Secret Service,* 593 F.2d 849, 851 (9th Cir. 1978)(Tang, J., concurring).

Schlaebitz, 924 F.2d at 194.

In summary, it seems clear that this Court and some of the courts of appeal have recognized that the provisions of § 2680(c) are ambiguous; that some courts of appeal have expressly recognized the existence of and articulated the competing interpretations arising from the ambiguity; that since the *Kosak* decision some courts of appeal have adopted a broad interpretation of the exception; and, that one or more of the courts of appeal may very well adopt a narrow reading of the

exception when the question presents itself in a proper case.

Given these developments, it is submitted that there is considerable uncertainty in the law as to whether § 2680(c) is sufficiently broad to cover law-enforcement officers acting well outside the scope of the Government's customs and excise activities.

C. The question presented by this case is an important question of federal law which should be decided by this Court.

When the subject exception is broadly applied to cover law-enforcement officers acting well outside the customs/excise context of government activity, persons whose personal property is damaged or destroyed during lawful detentions due to the negligence of law-enforcement officers have no effectual remedy available to them, so that in many instances innocent victims are simply left to themselves bear the full brunt of substantial losses resulting from the lack of ordinary care by federal employees. The injustice of this situation is manifest, particularly in light of the general intention of Congress in enacting the FTCA nearly a half century ago to largely eliminate such injustice through a broad waiver of sovereign immunity. As this Court observed in *Feres v. United States,* 340 U.S. 135, 139 (1950):

> The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a

> long effort to mitigate unjust consequences of sovereign immunity from suit.

Petitioner is not unmindful that, notwithstanding the injustice it would surely occasion, Congress found it necessary to retain immunity with respect to certain key governmental activities, and that § 2680(c) was intended to retain immunity from suits arising out of the detention of goods by customs and excise officers.

The question in this and similar cases, however, is whether Congress ever intended to retain sovereign immunity from property damage actions arising from *all* lawful detentions of private property by *all* kinds of law-enforcement officers acting in *any and all* contexts.

It is submitted that the injustice which results from the broad application of § 2680(c) outside the customs/excise context compels the resolution of the ambiguity inherent in the exception so that such injustice may be eliminated if Congress did *not* intend such an all-encompassing retention of immunity.

CONCLUSION

In *Kosak*, this Court construed another aspect of § 2680(c) by methodically analyzing the plain language and context of 28 U.S.C. § 2680(c), its legislative history, the purposes underlying the exceptions to the FTCA, and the central purpose of the FTCA itself. It appears that no such analysis has ever been made with

respect to that portion of the exception at issue in this case.

By employing the same method of analysis, strong arguments can be made that Congress never intended § 2680(c) to apply outside the customs and excise context of government activity and thereby preclude "a broader spectrum of suits to redress injury to property inflicted by federal law enforcement officers, whenever and wherever they are acting . . ." *Formula One, supra,* 777 F.2d at 825 (Oakes, J., concurring). Petitioner respectfully petitions this Court for an opportunity to present those arguments.

Based on the foregoing, Petitioner submits that this case presents an important question of federal law which has not been, but should be, settled by this Court. Petitioner respectfully urges this Court to grant this petition and use the opportunity presented by this clear and simple case to finally settle the lingering question as to the scope of 28 U.S.C. § 2680(c).

Respectfully submitted,

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Not for Publication

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June 09 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * * *

DICK GIFFORD,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

* No. 91-35376
*
* D.C. No.
* CV-90-98-JDS
*
*
*
*
*
* MEMORANDUM*

* * * * * *

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Submitted June 5, 1992**
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decisions without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Before: **FARRIS, NORRIS** and **KOZINSKI,** Circuit Judges.

The United States is immune from suit for "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. §2680(c). Gifford contends that section 2680(c) applies only to customs or excise officers. But we have held that "'[s]ection 2680(c) . . . does not apply solely to loss from detention of goods by tax or customs officers, but includes actions by 'any other law enforcement officer.'" *United States v. Lockheed L-188 Aircraft*, 656 F. 2d 390, 397 (9th Cir. 1979) (quoting 28 U.S.C. § 2680(c)); *see also A-Mark, Inc. v. United States Secret Service*, 593 F.2d 849, 850 (9th Cir. 1978). Thus, the district court correctly held that the actions of the BLM law enforcement officers fell within section 2680(c).

Alternatively, Gifford asks us to overrule *Lockheed*. As a three-judge panel, we are bound by prior decisions of this circuit. Gifford must file a suggestion for rehearing en banc if he wishes the court to consider overruling *Lockheed*.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

DICK GIFFORD,	)	FILED Feb 14 1991
	)	Lou Aleksich, Jr., Clerk
Plaintiff,	)	By Karen J. Herzog
vs.	)	Deputy Clerk
	)	
	)	Cause No. CV
UNITED STATES	)	90-98-BLG-JDS
OF AMERICA,	)	
	)	**MEMORANDUM**
Defendant.	)	**AND ORDER**
	)	**********

Presently pending before the Court is defendant's motion to dismiss the above-captioned cause for lack of subject matter jurisdiction. Upon careful consideration of oral argument and the briefs submitted in this matter, the Court is prepared to rule.

BACKGROUND

Plaintiff Dick Gifford instituted this action against defendant United States of America on May 16, 1990, seeking to recover damages under the **Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) and 28 U.S.C. §§ 2671 et. seq.**, for injuries to and loss of horses as a result of negligent actions on the part of Bureau of Land Management (BLM) law enforcement officers while such horses were being detained by the BLM.

Plaintiff Gifford acquired certain horses through the Adopt-a-Horse Program administered by the BLM under the **Wild and Free Roaming Horses and Burros Act (Act), 16 U.S.C., § 1331, et. seq.** During the spring and summer of 1986, plaintiff was the subject of two separate criminal investigations conducted by the BLM law enforcement branch for alleged violations of the **Act.**

The first criminal investigation involved allegations that untitled wild horses were being utilized as bucking stock in various rodeos in Wyoming and Montana. Following a rodeo in Gardiner, Montana, for which plaintiff Gifford was the livestock contractor, the Park County Sheriff's Office and the Montana Department of Livestock, in cooperation with the BLM, detained plaintiff's horses at the rodeo holding facility in order to conduct a brand inspection. Following completion of the inspection, BLM contracted with an independent trucking company to provide transport of the horses back to plaintiff. Plaintiff Gifford asserts that four of his horses sustained injuries during the BLM inspection due to negligent handling.

The second criminal investigation involving plaintiff resulted from an alleged sale or conversion of untitled wild horses in the possession of plaintiff. A number of plaintiff's horses were gathered by BLM law enforcement agents from Crow Reservation land and transported to the BLM horse facility in Britton Springs, Wyoming for inspection. Plaintiff contends that several of his horses were injured while in the exclusive control of certain BLM employees.

Defendant United States of America moved this Court, on October 9, 1990, for an order dismissing plaintiff's complaint pursuant to **Fed. R. Civ. P. 12(b)(1)**, for lack of subject matter jurisdiction.

DISCUSSION

Plaintiff Gifford alleges jurisdiction of this Court over the United States under **28 U.S.C. § 1346(b)** and under the **FTCA, 28 U.S.C. §§ 2671 et seq. Title 28, U.S.C. § 2674 and § 1346 (b)** provide that the United States shall be liable for tort claims to the same extent as private individuals under like circumstances. The **FTCA**, however, only "waived sovereign immunity from suit for certain specified torts of federal employees. It did not assure injured persons damages for all injuries caused by such employees." *Dalehite v. United States*, 346 U.S. 15, 17 (1953). The **FTCA** does provide numerous instances in which the United States is immune from liability under **28 U.S.C. §§ 1346(b) and 2674**. *See* **28 U.S.C. § 2680**. If a tort claim in an **FTCA** case falls within one of these instances, or exceptions to the general waiver of immunity, the district court lacks subject matter jurisdiction. *McQuade v. United States*, 839 F.2d 640, 642 (9th Cir. 1988) (quoting *Wright v. United States*, 719 F.2d 1032, 1034 (9th Cir. 1983)). Such is the situation in this case. The Court agrees with defendant's contention that the **Section 2680(c)** exception applies to the facts in this matter.

The **FTCA** does not apply to "any claim in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of Customs or Excise *or any other law enforcement officer.*" **28 U.S.C. § 2680(c)** (emphasis added). It is on the interpretation of this clause, "or any other law enforcement officer," that the present matter hinges. The United States contends that the United States Supreme Court has interpreted this whole exception (**Section 2860(c)**) broadly, holding that any claim arising out of the detention of goods, including negligent handling or storage of detained property, is barred. *See Kosak v. United States*, 465 U.S. 848, 853 (1984). Plaintiff Gifford does not openly contest the validity of the Supreme Court's specific holding with regard to the "arising our of" language, but asserts that the holding was "carefully and expressly limited to cases involving detentions by *customs officials*." (*See* Plaintiff's Answer Brief in Opposition to Motion to Dismiss, page 5). Plaintiff argues that **Section 2680(c)** should be narrowly construed to mean officers in the customs contest and cites cases that require a nexus between customs activity and the activity complained of[1]. While this Court does not

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[1] Admittedly, some courts have interpreted this exception to cover law enforcement officers only when their activity involves a sufficient nexus with customs activities. *See, e.g., Formula One Motors, Ltd. v. United States*, 777 F.2d 822 (2nd Cir. 1985). The contrary view has been expressed in several circuits. *See, e.g., United*

(continued...)

necessarily adopt plaintiff's narrow reading of *Kosak* as applying only to detentions by Customs officials, it is clear that the *Kosak* court specifically declined to decide what kinds of "law enforcement officer[s]," other than Customs officials, are covered by the **Section 2680(c)** exception. *See Kosak* at 852, n.6. This Court, therefore, finds that *Kosak* is determinative on the question of whether the language of **Section 2680(c)** means any claim "arising out of" the detention of goods, including a claim resulting from negligent handling or storage of the detained property; however, the *Kosak holding* is of little help with regard to whether "any other law enforcement officer" refers to officers other than in the customs context.

While the *holding* in *Kosak* does not settle the "or any other law enforcement officer" issue, the analysis undertaken by the *Kosak* court proves helpful in determining what the court's holding might be if faced with this question in the future. In *Kosak*, the Supreme Court considered a report by Judge Alexander Holtzoff, a major figure in the development of the

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[1](...continued)
States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1490-91 (10th Cir.) (Department of Agriculture), *cert. denied sub nom. Jarboe-Lackey Feedlots, Inc. v. United States*, 469 U.S. 825 (1984); *United States v. Lockheed L-118 Aircraft*, 656 F.2d 390, 397 (9th Cir. 1979) (Federal Aviation Administration); *United States v. 1,500 Cases, More or Less*, 249 F.2d 382, 384 (7th Cir. 1957) (Food and Drug Administration).

FTCA. Judge Holtzoff explained that **28 U.S.C. § 2680(c)**:

> . . . has special reference to the detention of imported goods and appraisers warehouses or customs horses, *as well as seizures by law enforcement officials*, Internal Revenue Officers, and the like.

Kosak at 856, *citing* A. Holtzoff, Report on Proposed Federal Tort Claims Bill 16 (1931) (emphasis added).

The Supreme Court noted that this report was never introduced into the public record and, consequently, should not be given great weight in determining the intent of the Legislature. *See Kosak*, at 857, n. 13. It is clear, however, that the *Kosak* court placed some weight on Judge Holtzoff's report.

The plain disjunctive language of **28 U.S.C. § 2680(c)**, as will as the Supreme Court's reliance on Judge Holtzoff's report, which contains similar disjunctive language, compels this Court to interpret "or any other law enforcement officer" to include law enforcement officials outside the customs context. Thus, the undersigned agrees with those cases applying exception **2680(c)** to law enforcement officers acting outside the excise/customs context as well as those acting within the customs context.

With regard to the matter presently before this Court, the undersigned finds that since the officials involved in the detention of plaintiff Gifford's horses

were BLM law enforcement officers (*see* Affidavit of John F. Putsche), their activities were covered by the **Section 2680(c)** exception, thereby precluding subject matter jurisdiction by this Court.

Accordingly,

IT IS ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction is hereby granted. The Clerk of Court is directed to enter judgment accordingly.

DONE and **DATED** this 14th day of February, 1991.

/s/ Jack D. Shanstrom
United States District Judge

United States Department of the Interior
OFFICE OF THE SOLICITOR
P.O. Box 31394
Billings, Montana 59107-1394

April 17, 1989
T-P-B-1121

CERTIFIED-RETURN RECEIPT

BLM.BL.0196

Michael G. Majerus
Attorney at Law
300 Transwestern Plaza II
490 North 31st Street
Billings, MT 59103

Dear Mr. Majerus:

Re: Administrative Determination: Claim of Richard Gifford for Property Damage

The claim submitted by you on behalf of your client, Richard Gifford, to the Bureau of Land Management (BLM), dated June 18, 1988, has been forwarded to this office for issuance of an administrative determination. The claim seeks damages in the amount of $24,800.00 for injuries to and loss of, or the loss of use of, several horses adopted under the BLM wild horse adoption program in July and August, 1986.

The administrative file reveals that, in the spring and summer of 1986, BLM law enforcement officers were

investigating your client in connection with the suspected use of untitled wild horses adopted under the wild horse adoption program as bucking horses for rodeos in violation of Federal law. As a part of this investigation, 25 horses apparently belonging to your client were detained at Gardiner, Montana, for examination by BLM officials. When these horses were delivered to your client at Cowley, Wyoming in the presence of Dr. Joel Undem, a veterinarian, one of the horses, a sorrel mare identified as Calamity Jane, was found to have an injured right rear leg. Dr. Undem stated that the injury was an old laceration.

As part of another investigation by BLM law enforcement officers into the suspected illegal sale of untitled wild horses, 18 horses allegedly belonging to your client were rounded up on the Crow Indian Reservation and surrounding land. The horses were also rounded up because they were trespassing on the Reservation. Those horses were rounded up by BLM employees between August 20 and 22, 1986, and were transported to the BLM facility at Britton Springs, Wyoming. The horses were then identified as bearing the hot brand of Daniel Half in addition to the Government freeze brand. During the round up on August 20, 1986, a gray mare with four socks was observed to have an injury to the left front pastern - fetlock area. The wound was bleeding but appeared to be an older wound.

This claim is considered under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, which provides for payment of money damages for property damage,

personal injury, or death resulting from negligent or wrongful acts of government employees under certain circumstances. Based upon your claim and all information available, I find that there is no evidence establishing a negligent or wrongful act on the part of any government employee as the cause of the damage claimed. This claim must be, and is therefore, denied.

In addition, the claim is denied for the following reasons:

1. The claim falls under one of the exceptions to the waiver of sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. 2680(c), in that it arises from the detention of goods by a law enforcement officer.

2. Although the claimed amount is $24,800.00, the itemized list of damages attached to the Standard Form 95 totals only $20,585.00.

3. The claim includes as items of damage interest and $500.00 in attorney's fees, neither of which are compensable under Federal law.

4. The claimed value of the horses and damage for loss of use are unsupported and unreasonable. Calamity Jane had a market value of approximately $500.00 and the horses rounded up on the Crow Indian Reservation were obtained from BLM at a cost of $125.00 each or less.

If you are dissatisfied with this determination, you have the right to file suit in an appropriate U.S. District

Court within six (6) months of the date of mailing of this determination or to request a reconsideration by this office within the same time period. A timely request for reconsideration will extend the time in which you have to file suit in U.S. District Court.

Sincerely,

/s/ Gerald R. Moore

Gerald R. Moore
For the Field Solicitor

Enclosure

United States Department of the Interior
OFFICE OF THE SOLICITOR
P.O. Box 31394
Billings, Montana 59107-1394

November 17, 1989
Reconsideration:
T-P-B-1121 (4/17/89)

CERTIFIED-RETURN RECEIPT

BLM.BL.0196

Richard Gifford
P.O. Box 242
Cowley, Wyoming 82420

Dear Mr. Gifford:

Re: Reconsideration of Administrative Determination T-P-B-1121 dated April 17, 1989 - Claim of Richard Gifford for Property Damage.

This will acknowledge receipt of your letter of October 4, 1989, asking for a reconsideration of the denial of your claim filed with the Bureau of Land Management (BLM) in the amount of $24,800.00, resulting from injuries to and loss of, or the loss of use of, several

horses adopted under the BLM Wild Horse Adoption Program in July and August, 1986.

We have reconsidered the matter in light of your letter of October 4, 1989, and regret to inform you that we cannot pay the claim after reconsideration.

Your request for reconsideration dated October 4, 1989, contains no information or supporting data not presented with your original claim and considered in the April 17, 1989 denial of the original claim. In particular, you have not submitted any information establishing your ownership of the horses at the time that they were rounded up and allegedly injured nor any explanation as to why the horses rounded up on the Crow Indian Reservation, if they did belong to you, were trespassing on the Indian trust land. In addition, you have failed to present evidence that the horses sustained injuries while in the custody of BLM employees. You have not provided evidence of the value of the horses which had to be destroyed or the amount of damages incurred due to the loss of use of injured horses. Finally, your request for reconsideration does not address the legal bar to recovery contained in 28 U.S.C. § 2680(c), which exempts from the provisions of the Federal Tort Claims Act claims for damage resulting from detention of goods by a law enforcement officer.

Your claim must be and is therefore denied.

If you are dissatisfied with this reconsideration, you may bring an action in the appropriate United States

District Court within six months from the date of mailing of this determination.

Sincerely,

/s/ Richard K. Aldrich

Richard K. Aldrich
Field Solicitor

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-35376
CT/AG#: CV-90-98-JDS

DICK GIFFORD,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the District of Montana (Billings).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Billings) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 6/9/92

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, BILLINGS DIVISION

DICK GIFFORD, **JUDGMENT IN A CIVIL CASE**

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case Number:
CV 90-98-BLG-JDS

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss for lack of subject matter jurisdiction is granted, and plaintiff's Complaint be and same is hereby dismissed.

February 14, 1991
Date

/s/ LOU ALEKSICH, JR.
Clerk

/s/ Karen J. Hertzog
(By) Deputy Clerk

Larry G. Grubbs
Cavan, Smith, Grubbs & Cavan
2501 Fourth Avenue North
P. O. Box 1297
Billings, Montana 59103
(406) 252-6656
ATTORNEYS FOR PLAINTIFF

FILED
May 16, 1990
Lou Aleksich, Jr.,
Clerk
By_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

DICK GIFFORD, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	Cause No. CV-90-BLG-JDS **COMPLAINT**

COMES NOW the Plaintiff and for his claims against the Defendant complains and alleges as follows:

COUNT ONE

1. This act [sic] arises under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq.*, as hereinafter more fully appears.

2. Plaintiff is a resident and citizen of the State of Wyoming, and the acts and omissions herein complained of occurred in this district.

3. At all times herein mentioned, Jack Putsche, Dale Tunnell, and several other men whose names are unknown to Plaintiff at this time, were employees of the United States of America, Department of the Interior, Bureau of Land Management (hereinafter "BLM"), a federal agency of the Defendant. In doing and omitting to do all the things alleged herein, said employees were acting within the scope of their respective employments, and with the permission and consent of the Defendant.

4. All of the negligent acts and omissions which gave rise to this action occurred within the State of Montana.

5. During 1984 and 1985, Plaintiff participated in the BLM's wild horse adoption program through the Rock Springs, Wyoming, office of the BLM and thereby obtained possession of a number of horses.

6. Between November of 1985 and April of 1986, Plaintiff received title from the BLM to each and every horse of which he obtained possession through said adoption program, and was at all times hereinafter mentioned the owner of the horses described herein.

7. Subsequent to obtaining title to all of said adopted horses, Plaintiff contracted to and did supply 25 horses for use in a rodeo held at Gardiner,

Montana, on June 28 and 29, 1986. Some of said horses had been previously acquired by Plaintiff from private parties, and some were those to which Plaintiff had obtained title through said BLM adoption program.

8. On or about June 30, 1986, Plaintiff travelled to Gardiner to pick up his horses and transport them back to Wyoming.

9. After the horses had been loaded into a trailer and Plaintiff and the trucker were ready to depart, Les Peterson, a Deputy Sheriff for Park County, Montana, arrived and stated that he was impounding the horses upon orders from authorities of the BLM in Montana (specifically including Mr. Putsche), whereupon he refused to allow Plaintiff to remove his horses from the rodeo grounds or to have possession of same. In so doing, Deputy Peterson was acting on behalf of the BLM in an official capacity as its agent and employee within the scope of said agency/employment and with the permission and consent of the Defendant, and he was for the purposes of this action an employee of the Defendant as defined at 28 U.S.C. § 2671.

10. Later on June 30, 1986, Plaintiff telephoned the BLM office in Rock Springs, Wyoming, and advised BLM employees there of the said detention of his said horses. Telephone calls were exchanged between employees of the Rock Springs BLM office and the Billings BLM office (including Mr. Putsche), at which time Mr. Putsche was advised that Plaintiff had weeks

and months before obtained title to all of the horses obtained by him through the BLM adoption program.

11. Some minutes later, Plaintiff received a telephone call from Mr. Putsche of the Billings BLM office. Plaintiff advised Mr. Putsche that all of the subject horses were owned by him, and that title to those horses which Plaintiff had obtained through the BLM's adoption program had been transferred to him many weeks before. Mr. Putsche informed that he did not believe Plaintiff, and that it was his intention to personally go to Gardiner and positively identify each and every horse in the above-referenced truck. Plaintiff requested that he at least be allowed to return home with those horses which had not been obtained through the BLM's adoption program, but Mr. Putsche refused the request and directed and demanded that all 25 of said horses remain in Gardiner for his inspection.

12. Pursuant to Mr. Putsche's demands and orders, Plaintiff unloaded the horses from said truck, whereupon same were inspected and all were found to be in good condition and without injury. Plaintiff thereafter returned to his home in Cowley, Wyoming.

13. At some time between Plaintiff's departing Gardiner on June 30, 1986, and the BLM's transporting said impounded horses to the Port of Entry in Frannie, Wyoming, on July 3, 1986, Mr. Putsche arranged for another BLM employee to be flown in from Nebraska to inspect said impounded horses, and he, Mr. Putsche, and other unknown BLM employees and agents did undertake to conduct an inspection of the brands on

each and every one of said impounded horses in Gardiner, Montana.

14. During said inspection, Mr. Putsche and said other unknown agents and employees so carelessly, negligently, and recklessly handled and herded said horses that four of them sustained injury. Said negligent conduct on the part of Mr. Putsche and the other unknown BLM employees was the direct and proximate cause of the injuries suffered by said horses, and of the hereinafter described damages sustained by Plaintiff.

15. Although three of said injured horses eventually healed up and recovered, one horse, a sorrel mare known as "Calamity Jane" (which had not been obtained through the BLM's adoption program) sustained permanent injury to her right rear leg during said negligently performed inspection, which proximately caused a diminution of her market value in the amount of $8,500.00, and further caused Plaintiff to lose the use of said horse as rodeo stock, all to his further damage in the amount of $3,000.00. Plaintiff also temporarily lost the use as rodeo stock of the three other injured horses, a palamino [sic] gelding, a roan gelding, and a white gelding, all to his further damage in the amount of $900.00. Additionally, Plaintiff incurred expenses in an amount to be determined for the examination and treatment of said horses [sic] injuries by a veterinarian, and incurred travel expenses in an amount to be determined.

16. The results of said BLM inspection were that the suspicions of Mr. Putsche and his fellow BLM employees were entirely unfounded, without substance, and pursued without reasonable cause, and that confirmation was had as to the truth of Plaintiff's pre-inspection statements to Mr. Putsche that he owned each and every one of the 25 horses, and that title to each and every horse included therein which had been obtained through the BLM's adoption program had been transferred to Plaintiff months before. The BLM thereupon transported said horses to the Port of Entry in Frannie, Wyoming, and returned possession of same to Plaintiff, including the four injured and untreated horses.

17. All conditions precedent to the commencement of this action have been performed or have occurred, including the timely presentment of this claim to, and the final denial of said claim by, the United States Department of the Interior, Bureau of Land Management, which final denial was in writing and sent to Plaintiff by certified mail on November 17, 1989.

COUNT TWO

18. Plaintiff realleges each and every allegation of paragraphs 1 through 6, inclusive, 10, 11, 16, and 17 of Count One, above, and incorporates same herein as though full set forth.

19. Following the debacle described in Count One, above, Plaintiff contracted with a Mr. Danny Half

to keep and pasture 16 of Plaintiff's horses (some of which had been obtained through the BLM's adoption program) on lands located just north of the Montana-Wyoming border which Mr. Half leased from the Crow Indian Tribe. At some point, some of the horses apparently strayed onto nearby lands within the State of Montana owned by private parties and by the Crow Tribe, all without objection by the owners of said lands.

20. Still suspicious notwithstanding the results of the investigation and inspection described in Count One, above, Mr. Putsche, Mr. Tunnell, and/or other BLM employees put together a crew of BLM employees from BLM offices in both Montana and Wyoming for the purpose of again taking possession of and inspecting horses owned by Plaintiff.

21. Prior to August 20, 1986, all of said 16 horses were in good health and physical condition.

22. On August 20 and 21, 1986, Mr. Putsche, Mr. Tunnell, and other BLM employees proceeded to round up Plaintiff's said 16 horses by chasing them with a helicopter, and then roughly forcing them into BLM trailers and transporting them with BLM trucks to a BLM corral facility at an area just south of the Montana-Wyoming border known as Britton Springs.

23. Said BLM employees were so careless, negligent, and reckless in their chasing, trapping, roping, pushing, pulling, and dragging of said horses into trailers that several of said horses were seriously injured and

crippled, and one of them subsequently died as the result of the injuries so sustained.

24. As a direct and proximate result of said negligent conduct and mishandling of said horses:

(a) A brown stud with a market value of $1,500.00 died from spinal injuries sustained in the roundup, all to Plaintiff's damage in the amount of $1,500.00, plus an undetermined amount for the loss of use of said horse as rodeo stock.

(b) A grey stud sustained permanent crippling injury to his right rear leg, all to Plaintiff's damage in the amount of $2,000.00 for diminution in market value and in an undetermined amount for loss of use as a bucking horse.

(c) A grey mare sustained permanent crippling injury to her right rear hip, all to Plaintiff's damage in the amount of $1,500.00 for diminution in market value and in and undetermined amount for loss of use as a bucking horse or a saddle horse.

(d) A black stud sustained permanent injury to his left hind quarters causing a limp, all to Plaintiff's damage in the amount of $1,000.00 for diminution in

market value and in an undetermined amount for loss of use as a bucking horse.

(e) Plaintiff incurred travel and veterinary expenses in amounts to be determined herein.

25. The above-described negligence on the part of said BLM employees was the direct and proximate cause of the injuries to said horses, and of the above-described damages sustained by Plaintiff as a consequence thereof.

COUNT THREE

26. Plaintiff realleges each and every allegation of paragraphs 1 through 25 of Counts One and Two, above, and incorporates same herein as though fully set forth.

27. Plaintiff does not know the exact cause or causes of the injuries to each of the above-described horses, such causes being solely within the knowledge of the BLM employees involved in the above-described detentions of said horses.

28. The subject horses were under the sole control and management of said BLM employees at all times immediately preceding and following their sustaining said injuries.

29. Under ordinary circumstances, said horses would not have sustained injury if said BLM employees

and/or their agents had used reasonable care in handling them.

30. The doctrine of *res ipsa loquitur* is applicable to this action, and the Defendant is liable to Plaintiff for his above-described damages.

WHEREFORE, Plaintiff prays for judgment against the Defendant for all the damages to which he is entitled under the circumstances, for his costs of suit, and for such other and further relief as to the Court may seem just and equitable in the premises.

DATED this 16th day of May, 1990.

CAVAN, SMITH, GRUBBS & CAVAN
2501 Fourth Avenue North
P. O. Box 1297
Billings, Montana 59103

By: /s/
Larry G. Grubbs
ATTORNEYS FOR PLAINTIFF